11-1800-4277-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the
Family Day License FINDINGS OF FACT,
Revocation Appeal of CONCLUSIONS AND
Catherine Sears-Clark. RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson at 10:00 a.m. on Monday, July 9, 1990, ;A the Scott County Courthouse Assembly Room in Shakopee, Minnesota. The record closed on July 20, 1990, when the Administrative Law Judge received the parties' post-hearing submissions.

Brian A. Nasi, Assistant Scott County Attorney, Scott County Courthouse, Room 206, 428 South Holmes Street, Shakopee, Minnesota 55379-1380, appeared on behalf of the Scott County Human Services Department ("the Local Agency") and the Minnesota Department of Human Services ("the Department"). Paul H. Thomsen, Attorney at Law, P.O. Box 67, 16670 Franklin Trail S.E,, Prior Lake, Minnesota 55372, appeared on behalf of Catherine Sears-Clark ("the Licensee").

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the

Commissioner. Parties should contact Ann Wynia, Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

## STATEMENT OF ISSUE

The issue in this case is whether the Licensee has fully complied with provisions of the family day care licensing rule!; set forth in Minn. Rules 9502.0335, subp. 6(F); 9502.0375, subp. 2(A) and (D); 9502.0425, subps. 9 and 10(C); 9502.0415, subp. 4(A); and 9502.0367(A) (1989), and if not, what, if any, disciplinary action should be taken.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Catherine Sears-Clark resides at 2836 Center Road S.W. , Prior Lake, Minnesota 55372. She has been licensed as a Class A family day care provider since January 9, 1989, and currently operates a day care at her residence in Prior Lake.

2. The Licensee applied for her family day care license on or about August 25, 1987. Although the application process usually takes about six months to complete, the Licensee was not licensed until January of 1989. The delay in the licensing process occurred because certain medical information forms were not returned by the Licensee to the Local Agency until May of 1988; the fire inspection of the Licensee's residence was not completed until July of 1988; the Licensee's fingerprints were misplaced and had to be obtained a second time; and an FBI background check was not completed until January of 1989.

3. The FBI background check conducted with respect to the Licensee revealed a conviction of perjury in 1986 and outstanding charges in the State of Nebraska regarding worthless checks. Because criminal charges of this magnitude were not viewed as automatic disqualifiers, the Licensee was licensed despite her criminal record.

4. The Local Agency was aware that the Licensee was operating a day care home from the time of her application for a family day care license until the license was granted. The operation of the day care home prior to licensing is not asserted in this proceeding as grounds for the adverse action against the Licensee.

5. The Local Agency received four anonymous complaints with respect to the Licensee's day care prior to her licensure:

a. On April 21, 1988, the Local Agency received an anonymous complaint alleging that the Licensee left the day care

children in the care of her fifth grader while she ran errands; lost a two-year-old child in the grocery store; often had to be awakened at 8:00 a.m. when the children arrived; left children in the care of a "landlord" who was sleeping on the couch; required her nine-year-old to care for her two-year-old brother after school; permitted her fifth grader to frequently oversleep in the morning; spanked a two-year-old child; allowed her fifth grader to discipline the day care children; and transported day care children without permission, with too many children in the car, and without using seat belts or car seats for the children.

b. On July 6, 1988, an anonymous complaint was received apparently from the same complainant alleging that the complainant's two-year-old who had gotten lost in the grocery store still had nightmares; the Licensee had taken a car full of children to Minneapolis without using car seats; the complainant's two-year-old had been spanked by the Licensee's daughter; and a nine-year-old

girl was told to fold laundry and to watch the children while they were outside.

C. On July 17, 1988, an anonymous complaint was received alleging that children were playing in the Licensee's garage where nails were present and on top of a race car set on blocks . The complainant also alleged that the Licensee was sitting on the front steps of her next door neighbor's house at 3:00 p.m. and the children were not in sight.

d. On September 2 2 1988, an anonymous complaint was received in which the caller indicated that she was concerned that the Licensee was caring for four children under the age of seven months and eight children between the ages of seventeen months and four years. The complainant also alleged that the Licensee propped bottles, did not have enough time to care for the children properly , and left the children at home wi th a teenager during the summer months while she ran errands.

6. Donna Johnson, it licensing worker with the Local Agency, made two visits to Licensee's residence prior to July of 1988. The Licensee's file with the Local Agency does not contain any information suggesting that Ms. Johnson noted any areas of noncompliance during these home visits.

7. After Ms. Johnson left the Local Agency in July of 1988, Noreen Rossa, a social work supervisor in the area of day care licensing employed by the Local Agency, was responsible for handling the Licensee's application.

8. Ms. Rossa interviewed the Licensee on or about July 6, 1988, with respect to the allegations set forth in paragraph 5(b) above. The Licensee denied all allegations, and no licensing violations were substantiated.

9. Ms. Rossa made a visit to the Licensee's residence in approximately July of 1988. Ms. Rossa observed that a bottle had been propped for an infant

in the Licensee's care and that an infant had been placed in a mesh-sided playpen. A Licensing/Compliance Review form was issued to the Licensee on or about July 30, 1988, noting the bottle-propping and playpen incidents and informing the Licensee that she had been found to be in noncompliance with Minn. Rules 9502.0415, subp. 4(A), and 9502.0425, subp. 9.

10. Ms. Rossa conducted another home visit in approximately October of 1988. During that visit, she observed that the Licensee was caring for a total of seven children, three of whom were infants. The Licensee also cared for a toddler on a drop-in basis on Tuesdays and Thursdays. A Licensing/Compliance Review form was issued to the Licensee on October 5, 1988, noting that she had been found to be in non-compliance with the Class A license provisions set forth in Minn. Rules 9502.0367. The form indicated that, in order to comply with the rule, the Licensee would have to ensure that she had no more than two infants and six preschoolers at any one time, and further stated that a porta-crib or crib would have to be added to the Licensee's equipment. Ms. Rossa determined that the age distribution requirements had been violated due to the drop-in care provided by the Licensee.

11. Three anonymous complaints were received regarding the Licensee' s day care following the issuance of her day care license on January 9 , 1 989:

a On or about March 10, 1989, a complaint was received by the Local Agency alleging that the complainant had observed an approximately three-year-old child pounding and screaming at the door of the day care residence for about fifteen minutes. The complaint alleged that the Licensee opened the door once and then closed it, and that the child was eventually let into the house.

b. An anonymous complaint was received by the Local Agency on March 30, 1989, in which the complainant alleged, inter alia, that the Licensee verbally abused the children, did not report accidents, left the c hildren outside while she took a nap , did not use gates on the stairways, stated that she had fourteen children in her care, employed a substitute who might riot be eighteen years old, placed a seven- to nine-month old infant in a bassinet who then fell out of the bassinet, cared for four to five babies who were under- one year of age, and maintained a dirty house.

C. An anonymous complaint was received by the Local Agency on September 6, 1989, alleging that the Licensee had been arrested for possession of cocaine on August 26, 1989. The complainant alleged that the Licensee was released on bail by August 28, 1989, and that her first court appearance was scheduled for September 11, 1989. The complainant further stated that the Licensee was angry and contended that she had been set up.

12. Ms. Rossa and Pamela Lamb, a licensed social worker who is employed by the Local Agency as a day care license worker, made an unannounced visit to the Licensee's residence on April 5, 1989. The Licensee denied the allegations made by the anonymous complainant who had contacted the Local Agency on March 30, 1989. Ms. Lamb observed that, while the Licensee had a gate for use on the stairs, she was not using it at the time of the visit. Ms. Lamb also observed that the house was somewhat cluttered, the bedding was stripped off of a number of the beds in the bedrooms, and an infant was sleeping in a mesh-sided playpen. There was no visible evidence of a bassinet being used as alleged by the anonymous complainant. -The Licensee reported to Ms. Rossa and Ms. Lamb that she had been using two helpers or occasional substitutes during the day. She indicated that Lori Schoemaker, aged twenty-one, usually worked from 8:00 a.m. to 10:00 a.m., and Christy Ryks, age eighteen, worked from 2:30 p.m. to 5:00 p.m. A Licensing/Compliance Review form was issued to the Licensee on or about April 5, 1989, indicating that the Licensee had been found to be in non-compliance with Minn. Rules 9502.0425, subp . 9, and 9502.0425, subp . 10(C), The form indicated that , in order to comply with the rules, a mesh-sided playpen was not to be used for the care or sleeping of an infant and a porta-crib instead should be obtained, and that gates or barriers must be used on stairways with children between the ages of six to eighteen months.

1 3 . On or about Friday, May 12, 1989, Debra Preuss, the mother of Lauren Preuss, an infant in the Licensee's day care, noticed a rash on Lauren's knees and feet. The rash disappeared over the weekend but reappeared the following Monday, May 15, 1989. The Licensee called Ms. Preuss and the other parents on Monday, May 15, to tell them that the rash had gotten worse, and sent the children home early that day. Lauren's doctor identified the rash as a chemical burn on May 16, 1989, or May 17, 1989. On May 17, 1989, the Licensee spoke to her builder and the carpet warehouse from which she had obtained her carpeting, and the carpeting was replaced on May 18, 1989.

14. On May 19, 1989, Ms. Lamb conducted an inspection of the Licensee's newly-built residence. At that time, the Licensee told Ms. Lamb about the chemical burn incident. Ms. Lamb observed that a few of the children who were still crawling apparently had a rash from the new carpeting but did not see anything that would "endanger" the kids. The Licensee agreed during the visit to provide an accident report form with respect to the chemical burns.

15. At the time of Ms. Lamb's visit on May 19, 1989, all hazardous and toxic materials were out of the reach of the children or safety latches were being used with the exception of a few prescription bottles located below the bathroom sink which the Licensee immediately moved up out of reach. In addition, the fire extinguisher had been recharged, and all electrical outlets that were not being used were covered by safety plugs with the exception of one missing plug which the Licensee immediately replaced. !Is . Lamb recommended that the Licensee's new home be licensed for a Class A family day care for a capacity of up to ten children, and indicated in her notes with respect to the inspection that another v i s it would be conducted by January 1, 1990, for re-licensing purposes.

16. In June of 1989, he Licensee and Lori Schoemaker took five of the

older day care children on a field trip to the zoo and left three younger day care children at the day care residence in the care of Christy Ryks. Ms. Ryks discovered one of the day care children in the bathroom holding an uncapped bottle of cleanser, feared that the child had ingested a toxic substance, and called 911. The child did not become ill , and possibly had not swallowed any cleanser.

17. Ms. Ryks did not inform the Licensee of the suspected poisoning or the 911 call , and the Licensee did not learn of it until she read about it in the newspaper. The Licensee informed the mother of the child involved about the incident the same day she learned of it. The Licensee also fired Ms. Ryks.

18. On or about June 22, 1989, Ms. Lamb received an anonymous call that the Prior Lake Rescue Squad had been called out to the Licensee's residence due to the suspected poisoning of a day care child. Ms Lamb sent the Licensee a letter dated June 22 , 1989, noting that she had not received the accident report forms with respect to the chemical burn incident or an accident report form with respect to the suspected poisoning. It Lamb enclosed addtional accident report forms and stated in the letter that a failure to follow through with the filing of accident report forms violated Minn. Rule 9502.0375 D. Ms. Lamb further stated that she expected to receive the accident report forms from the Licensee no later than Friday, June 30, 1989.

19 On June 30, 1989, Ms. Lamb received a telephone call from the Licensee in response to Ms Lamb's letter of June 22, 1989. The Licensee indicated that she had not known about the suspected poisoning until she read about it in the paper and received Ms. Lamb's letter. The Licensee stated that the incident had occurred while her eighteen-year-old helper, Christy Ryks, was caring for the children and that Ms. Ryks had not told the Licensee about the situation. The Licensee stated that she had fired Ms. Ryks and agreed to send in an accident report form.

20. On June 30, 1989, Ms. Lamb sent the Licensee a memo indicating that she should complete and return to Ms. Lamb a law enforcement background check form with respect to Lori Schoemaker if she was continuing to employ Ms. Schoemaker. Ms. Lamb had also reminded the Licensee of the need to complete law enforcement background check forms with respect to her day care helpers during the inspection of the Licensee's new home on May 19, 1989.

21. During the first week of June, 1989, the Licensee completed the accident report forms with respect to the chemical burn incident and gave an envelope containing the forms to Deborah Pruess, a parent of one of her day care children. Ms Pruess had access to a postage weighing machine at her place of employment, and the Licensee asked her to check the weight of the envelope to insure that there was proper postage. Ms. Pruess Miailed the accident report forms during the first week in June. There i s no information in the record concerning to whom the envelope containing the forms was addressed.

22. Ms Lamb d i d not receive the acc ident report forms with respect to the chemical burn or suspected poisoning incident or the law enforcement background check form with respect to Lori Schoemaker until sometime after July 19, 1989.

23. The Licensee was delayed in submitting the accident report form to

the County with respect -to the suspected poisoning incident because she had difficulty locating and obtaining information from Ms. Ryks. It took her approximately sixty days to obtain the necessary information from Ms. Ryks.

24. Ms. Lamb processed the law enforcement background check forms with respect to Lisa Schoemaker and Lori Schoemaker. W hen the background checks revealed narcotics charges against Lori Schoemaker and charges involving arson and terroristic threats against Lisa Schoemaker, the Licensee agreed not to use these two individuals in the future.

25. Upon receiving the anonymous report of the Licensee's arrest for possession of cocaine, Ms. Lamb sent a law enforcement background release with respect to the Licensee to the Scott County Sheriff's Department. The Sheriff's Department issued a report indicating that: (1) on February 23, 1989, the Licensee had been arrested and jailed on a Scott County Werrant for worthless checks and a Dakota County warrant for worthless checks; (2) on July 24, 1989, the Licensee had been arrested and jailed on a Dakota County warrant for worthless checks; and (3) on August 2 6 , 1989, the Licenseee had been arrested by the Scott County Sheriff for driving after the suspension of her license, possession of controlled substances, a Dakota County warrant for worthless checks, and two Scott County warrants for worthless checks. The Sheriff's Department stated that formal charges were pending on the driving after suspension and possession of controlled substances allegations.

2 6. The complaint issued with respect to the criminal action against the Licensee alleges , inter alia, that the Licensee was stopped by a Deputy of the Scott County Sheriff's Department while she was driving a car registered in the name of an individual for whom there was an outstanding felony warrant from Hennepin County. The complaint further alleges that the Deputy observed the Licensee pick up a small br a s s cigarette case, ()pen the cigarette case, and take out her dr iver' s license. As she was doing thi s , the Deputy saw a single-edged razor blade, a small piece of tube, and a wrapped packet in the cigarette c a se -The Licensee closed the cigarette case after removing her license and stuffed the case down into the back of the front driver's seat. The substance in the wrapped packet was later tested and determined to be cocaine.

2 7 . The Licensee testified at her criminal trial and it the hearing in this matter that she had in fact removed her driver's license from the pocket of a pair of shorts she had in the car and had knocked the cigarette case off of the console when she reached for her shorts. She testified that the case and its contents did not belong to her.

28. On April 26, 1990, after a jury trial, the Licensee was found guilty of the charge of possession of a Schedule 11 controlled substance in the fifth degree.

29. The Licensee was sentenced to five years probation based upon her conviction. She also was ordered to attend a chemical awareness class and pay a $400.00 fine.

30. Prior to the Licensee's arrest, Ms. Lamb had decided to recommend that a negative licensing action be initiated against the Licensee and that the Licensee be placed on a probationary status based upon her rule violations. After the Licensee's arrest, the Local Agency recommended to the Department that the Licensee's license be revoked.

31. The Department sent the Licensee a letter dated Noveater 14, 1989, notifying her of the revocation action and informing her of her right to appeal. The Licensee filed a timely appeal of the revocation decision.

32 . The hearing in this matter was originally scheduled for February 5, 1990. The hearing was postponed based upon an agreement of counsel for the parties pending the disposition of the criminal charges against the Licensee. Following the Licensee's conviction on the cocaine possession charges, the hearing was scheduled for June 11, 1990. -this hearing was continued at the request of the Licensee in order that she be afforded an opportunity to retain counsel.

3 3 . On February 8, 1990, Ms. Lamb visited the Licennee's residence. She found that the Licensee did not have the appropriate size fire extinguisher,

that there were no safety latches on the knife drawer or in the cupboards under the sink, the Licensee's cat needed rabies shots, the Licensee had not completed the infant first aid and CPR training required curing the first year of licensure, the Licensee was not using a stairway gate consistently, and the Licensee was caring for four children under two and one-half years of age. A Licensing/Compliance Review form was completed with respect to the rule violations noted during the February 8, 1990, visit.

34. The Licensee had purchased the improper f ire extinguisher at a hardware store in rel iance upon the s al es c I erk' s erroneous assurance that it was appropriate for day care use.

3 5 . Ms. Lamb visited the day care residence again on March 16, 1990. The Licensee was not home at the time of her visit. Pamela Botkin was substituting for the Licensee. This was the first day that Ms. Botkin had cared for the day care children. Ms. Botkin had been licensed by Scott County in 1988 to provide family day care, and had provided day care in her own home between April and September of 1988. The Licensee had not notified the Local Agency prior to the home visit in March of 1990 of the employment of Ms. Botkin. Ms. Lamb did not go into the day care home on March 16, 1990, but made note of Ms. Botkin's name. She later sent a background check form to the Licensee for use with respect to Ms. Botkin. The Licensee returned the form. The background check did not reveal any past infractions by Ms. Botkin.

3 6 Ms. Lamb visited the day care residence on May 2 , 1990, and May 14, 1990. No one was present at the residence on those dates.

3 7 . Ms. Lamb visited the day care residence again on May 17, 1990. The day care was closed on that date because the Licensee's daughter was home sick. Ms. Lamb observed that some of the violations noted on February 8, 1990, were still present. The Licensee had added a second cat and had not obtained rabies shots for the prior cat or ttat cat, although she stated that she was planning to take both cats to the veterinarian for shots on May 22, 1990. The Licensee still did not have an appropriate fire extinguisher or safety latches on the knife drawer or under the sink. She had not taken an infant CPR class, but indicated that she was planning to register for one. his. Lamb determined that the Licensee had a gate at that time and also was no longer out of compliance with respect to having more than three children under the age of 2-112 because one child had turned 2-112 years old since her February visit.

38. On May 23, 1990, the Licensee called Ms. Lamb on the telephone and indicated that she was registered for an infant CPR class; she had ordered an appropriate fire extinguisher and gate; she had installed safety latches; and she was scheduled to take her cats into the veterinarian for shots.

39. On June 15, 1990, the Licensee sent the Local Agency forms confirming that her cats had received rabies shots. The Local Agency did not conduct any further visits to the day care residence prior to the hearing in this matter on July 9, 1990.

40. On one occasion, a day care child was sleeping on the floor during a visit of a Local Agency representation to the Licensee's day care residence. The child involved did not like being placed in a crib when he was away from home. The Licensee remained in the room with him while he was sleeping on the floor. The Licensee was not aware at the time that it was improper for the child to sleep on the floor.

41. Christy Ryks substituted for the Licensee approximately twice a month for not more than one or two hours each time. She did not substitute for the Licensee a cumulative total of more than thirty days within at twelve-month period.

42 . Lori Shoemaker was a substitute or hel per in the Licensee' s day care residence pri mar ily during March through May of 1 989 , when the Li cen see' s new home was under construction. She had previously been a part-time employee of a day care center called "The Cookie Jar." The Licensee called The Cookie Jar and Lori Shoemaker's three other prior employers for references prior to employing her. Lori Schoemaker did not substitute for the Licensee a cumulative total of thirty days within a twelve-month period.

43. Lisa Schoemaker, Lori's s ister , worked in the Licensee's day care residence only one or two times.

44. Neither the Local Agency nor the Department have provided the Licensee with any orientation or training sessions with respect to the requirements of the rules governing family day care homes.

45. The Licensee continues to use her mesh-sided playpen outs i de at times, but no longer permits children to sleep in the playpen.

46. The Licensee admits that the age distr ibuti on of the children in her day care residence di d not comply with the Department' s rules during a time period of approximately three to four months.

47. Although the Licensee now use s a gate on the stairs when small children are present , she di d not use one at times in the past because some of her day care children were "climbers " and she felt it was safer for her to teach the children to go up and down the stairs rather than have them f all after climbing over or shaking a gate.

48. There is no evidence that the Licensee has used any controlled substances while a day care provider.

49. The Licensee underwent voluntary urine analysis and chemical dependency assessment prior to the hearing in this matter. A laboratory report from MedTox Laboratori es , Inc - in St . Paul , Minnesota , whi ch was submitted as Clark Exhibit No 1 by the Licensee at the hearing, indicates that a urine

sample collected on July 3, 1990, from the Licensee was negative for ethyl alcohol; amphetamines; barbiturates; benzodiazepines; cocaine metabolite; opiates; phencyclidine (PCP); and THC (marijuana) metabolite. A report relating to a chemical dependency assessment conducted by Dick Swerdlick, a Chemical Dependency Counselor with Scott County Human Services, was submitted by the Licensee as Clark Exhibit No. 2 at the hearing. In his assessment report dated June 28, 1990, Mr. Swerdlick concludes that, while "there is no specific data . . . to indicate with any certainty that [the Licensee] is chemically dependent," the Licensee "would appear to be labeled as 'at risk' to developing chemical dependency" based upon the fact that "[a]t least one of her biological parents has had a problem with alcohol ow drug addiction," and "[s]he associates with a group of people, at least some of her peer group, who glamourize or condone the usage of alcohol or other mood altering substances in an irresponsible manner."

50. The day care operated by the Licensee provides her sole source of income.

51. Five parents of children in the Licensee's day care facility testified at the hearing that they consider the Licensee to be a competent and loving day care provider. These parents also testified that the Licensee kept them well-informed concerning the cocaine charge and the County's allegations and that the Licensee acted appropriately with respect to the chemical burn and suspected poisoning incidents.

Based upon the foregoing Findings of Fact, the Administrative Law -Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 245A.08.

2. The Notice of Hearing is proper in all respects and the Local Agency and the Department have complied with all substantive and procedural requirements of law and rule.

3. Minn. Stat. 245A.08, subd. 3(a), provides as follows:

> At a hearing regarding suspension, immediate suspension, revocation, or making probationary Et license for family day care . . ., the commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If' the commissioner demonstrates that reasonable cause existed, the burden of proof in hearings involving suspension, immediate suspension, revocation, or making probationary a family day care . . . license shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or

rules that the commissioner alleges the license holder violated, at the time the commissioner alleges the violations of law or rules occurred.

This allocation of the burden of proof withstood a due process challenge in Re Judith Cullen, No. C4-88-2609 (Minn. Ct. App. July 18, 1989).

4. Minn. Stat. 245A.07, subd . 3, authorizes the Commissioner to suspend , revoke , or make licenses probationary where the license holder fai 1 s to comply fully with applicable laws or rules. The statute further provides that , ''[w]hen applying sanctions authorized under thi s section , the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.' In addition, Minn. Stat 245A.04, subd. 6, provides that, "Before granting, suspending, revoking, or making probationary a license, . . . [t]he commissioner . . . shall consider facts , conditions, cm circumstances concerning the program's operation, the well-being of persons served by the program, consumer evaluations of the program, and information about the character and qualifications of the personnel employed by the applicant or license holder."

5. Minn. Rules 9502.0335, subp. 6, provides as follows:

> Disqualification factors. An applicant or provider s hall not be issued a license or the license s ha I I be revoked, not renewed, or suspended if the app I i cant, provider, or any other person living in the day care residence or present during the hours children are in care, or working with children:
>
> F. Has had a conviction of, has admitted to, or there is a preponderance of the evi dence indi cat ing the commiss ion of any crime listed in Minnesota Statutes, Chapter 152 . . . .

6. Minn. Rules 9502 .0365, subp . 5, provides that, "A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute care giver must be limited to a cumulative total of not more than thirty days in any twelve-month period."

7. Minn. Rules 9502.0315, subp. 24, defines "provider" as "the license holder and primary caregiver."

8. Minn. Rules 9502.0315, subp. 29, defines "substitute" as "an adult at least eighteen years of age who assumes the responsibility of the provider as specified in part 9502.0365, subpart 5."

9. Minn. Rules 9502.0375, subp. 2(A), requires that the provider inform the agency w ith in thirty days of " the add it i on of an employee who will regularly be providing care."

10. Minn. Rules 9502.0315, subp. 26, defines "regularly" or "regular basis" to mean "a cumulative total of more than 30 days within any12 month period."

11. Minn. Rules 9502.0375, subp. 2(D), requires that the provider inform

the agency "immediately after the occurrence of any serious injury or death of a child within the day care residence. A serious injury is one that is treated by a physician." The rule does not expressly require the submission of written accident forms.

12. Minn. Rules 9502.0345, subp. l(H), requires that the county or multi-county board maintain "[a]rrest, conviction, or criminal history records . . . on any person living or working in the day care residence."

13. Minn. Rules 9502.0425, subp. 9, provides as follows:

> Infant nd newborn sleeping space. There must be a safe, comfortable sleeping space for each infant and newborn. A crib, portable crib, or playpen with waterproof mattress or pad must be provided for each infant or newborn in care. The equipment must be of safe and

sturdy construction that conforms to volume 16, parts 1508 to 1508.7 and parts 1509 to 1509.9 of the Code of Federal Regulations, its successor, or have a bar or rail pattern such that a 2-3/8 inch diameter sphere cannot pass through. Playpens with mesh sidings must not be used for the care or sleeping of infants or newborns.

14. Minn. Rules 9502.0425, subp. 10(C), requires that "[g]ates or barriers must be used [on stairways] when children between the ages of 6 and 18 months are in care

15. Minn. Rules 9502.0415, subp. 4(A), requires that the provider "hold the infant or newborn during bottle feedings until the child can hold its own bottle. Bottles must not be propped."

16. Minn. Rules 9502.036(A) sets forth the child/adult ratios and age distribution restrictions for family day care licensees as follows:

A. Family Day Care:

| Child/Adult Ratio | | | Age Restrictions |
|---|---|---|---|
| Licensed Capacity | Adults | Total children under school age | |
| 10 | 1 | 6 | Of the total children Linder school age, a combined total of no more than 3 shall be infants and toddlers. Of thi s total, no more than 2 shall be infants. |

17. The Local Agency and the Department have demonstrated reasonable cause to believe that the Licensee violated Minn. Rules 9502.0335, subp. 6(F) due to her conviction in April of 1990 for possession of a Schedule II

controlled substance in the fifth degree, and the Licensee has failed to show by at preponderance of the evidence that she has not violated this rule. A finding of a violation of Minn. Rule 9502.0335, subp. 6(F) mandates a recommendation that the Licensee's license be revoked.

18. Christy Ryks, Lori Schoemaker, and Lisa Schoemaker A (I not "regularly" provide care as defined in Minn. Rules 9502.0315, subp. 26. The Licensee thus was not required by the rules to inform the Local Agency of the addition of these employees. Accordingly, the Local Agency and the Department have failed to demonstrate reasonable cause to believe that the Licensee violated Minn. Rules 9502.0375, subp. 2 (A) , and the Licensee has shown by a preponderance of the evidence that she has not violated that rule. Although Minn. Rules 9502.0345, subp. l(H), requires the agency to maintain criminal history records on "any person . . . working in the day (:are residence," this rule does not purport to impose Et reporting requirement on licensees. The Licensee satisfied her obligation by having her employees execute law enforcement background checks authorizations and returning them to the Local Agency.

1 9. The Local Agency and the Department have demonstrated reasonable cause to believe that the Licensee violated Minn. Rule 9502.0375, subp. 2(D), in June of 1989 when she failed to inform the Agency immediately after she learned of the occurrence of the suspected poisoning incident, and the Licensee has failed to show by a preponderance of the evidence that she did not violate this rule. Although the Licensee admittedly learned of this incident after reading about it in the newspaper, she did not contact the Local Agency until June 30, 1989, after she received an inquiry from the Local Agency. The Local Agency and the Department [have not demonstrated reasonable cause to believe that the Licensee violated Minn. Rules 9502.0375, subp. 2(D), in May of 1989, with respect to the chemical burn incident, since the Licensee informed Ms. Lamb of the incident within a few days after its occurrence. The Licensee thus has shown by a preponderance of the evidence that she has not violated Minn. Rules 9502.0375, subp. 2(D), with respect to the chemical burn incident.

20. The Local Agency and the Department have demonstrated reasonable cause to believe that the Licensee violated Minn. Rules 9502.0425, subp. 9, in July of 1988 and April of 1989 when she placed infants in ai playpen with mesh siding, and the Licensee has not shown by a preponderance of the evidence that she has not violated this rule.

21. The Local Agency and the Department have demonstrated reasonable cause to believe that the Licensee violated Minn. Rules 9502.0425, subp. 10(C), in April of 1989 when she failed to use gates or barriers on stairways when children between the ages of six and eighteen months were in care, and the Licensee has failed to show by a preponderance of the evidence that she has not violated this rule.

22. The Licensee demonstrated that the infant whose bottle was propped in July of 1 988 could hold hi s own bottle at the t i me. Accordingly, the Local Agency and the Department have failed to demonstrate reasonable cause to

believe that the Licensee violated Minn. Rules 9502.0415, Subp. 4(A), and the Licensee has shown by a preponderance of the evidence that she has not violated this rule.

23. The Local Agency and the Department have demonstrated reasonable cause to believe that the Licensee violated Minn. Rules 9502.0367(A) in October of 1988, when she had more than two infants and moDre than six total children under school age in her care, and the Licensee has failed to show by a preponderance of the evidence that she has not violated this rule.

24. The Licensee has failed to meet her burden to show full compliance with the Minnesota Rules as specified in Conclusions 17, 19, 20, and 23 above.

Based upon the foregoing Conclusions, and for the reasons discussed in the attached memorandum, the Administrative Law Judge makes the following:

## RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner's proposed revocation of Catherine Sears-Clark's family day care license be affirmed.

Dated this 15th day of August, 1990.

BARBARA L. NEILSON
Administrative Law Judge

## Notice

Pursuant to Minn . Stat . 1 4. 62 , subd . I , the Agency i s requ I red to serve its final decision upon each party and the Administrative Law Judge by First Class Mail.

Reported: Tape Recorded (four tapes).

## MEMORANDUM

The Licensee concedes that she has been convicted of a violation of a crime specified in chapter 152 of the Minnesota Statutes.1/ She argues, however, that the rules promulgated by the Department of Human Services governing day care providers should not be Interpreted to mandate the revocation of her day care license unless the criminal activity has had a negative effect upon the care of the children. As a basis for th I s argument, the Licensee contends that the language of item F of subpart 6 of Minn. Rules 9502.0335 (the rule provision at issue) must be read in conjunction with item A of the same subpart of the rules . Because item A requires revocation of licenses in drug abuse situations only to the extent that the use of

I/ The Licensee was charged in Count I of the criminal complaint introduced

by the County as part of Exhibit I in this matter with violations of Minn. Stat. 152.01, subd. 10(l); 152.02, subd. 3(l)(d); 152.09, subd. 1(2); and 152.15, subd. 2(l). Because Minn. Stat. 152.09, subd. 1(2), and 152.15, subd. 2(l) were repealed effective August 1, 1989 (approximately three weeks prior to the date of the Licensee's arrest), it appears that these statutory provisions were erroneously cited in the complaint. The Licensee was eventually convicted of possession of a Schedule II controlled substance in the fifth degree (see County Exhibit 2), a crime which is defined in a statute that became effective on August 1, 1989. See Minn. Stat. 152.025, subd. 2. It thus cannot be disputed (and, in fact, the Licensee concedes) that the Licensee was convicted of a crime listed in Chapter 152.

control led substances by the provider or other persons living, working, or present in the day care residence "has or may have a negative effect on the ability of the provider to give care or is apparent during the hours children are in care , " the Licensee contends that a s imilar proviso must be read into item F.

The Licensee's argument is not persuasive. The plan language of Minn. Rules 9502.0335, subp. 6 (F), requires that a license "$hall be revoked . . . if the provider..... [h]as had a conviction of..... any crime listed in Minnesota Statutes, chapter 152 . . (Emphasis added.) It is not possible to drawn any inference from the language of this provision that revocation is appropriate only if there is a conviction under Chapter 152 and the criminal conduct leading to the conviction had a negative impact upon the care of the day care children. The Department clearly knew how to delineate the negative impact requirement, since it chose to include it in item in of the same subpart of the rules. The absence of an articulation of such a requirement in item F compels the conclusion that the Department intended noA to include it. It i s a well-establ i shed principle of statutory construction that, "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. 645.16 (1988). It is also well-settled that the word " s ha I 1 " is mandatory in nature. Minn. Stat. 645.44, subd. 16. Such general rules of construction are equally applicable when interpreting the proper meaning of rules that have been promulgated by an administrative agency. The Licensee's conviction for possession of a Schedule II controlled substance in the fifth degree clearly amounts to a conviction Linder Chapter 152 of the Minnesota Statutes, and requires revocation of her license under item F.2/

The propriety of taking adverse action against the Licensee's license

finds further support in the Licensee' s violation of other provisions of the family clay care rule s promulgated by the Department of Human Services The Local Agency has e s tab 1 i shed that , between July of 1988 and July of 1989, the Licensee violated the prohibition against the use of mesh-sided playpens contained in the family day care licensing rules on two occasions, the age distribution requirements on one occasion, the stairway gate or barrier requirement on one occasion, and the requirement that a serious injury be reported immediately following its occurrence on one occasion. The Licensee argues that these violations should be viewed as minor infractions of fairly insignificant rules, and that the County representatives were looking for violations simply because they did not like her.

21 Item F also requires license revocation where the licensee has admitted to the commission of a crime or where "there is a preponderance of the evidence indicating the commission" of a crime. Because the hearing in the present matter proceeded by agreement between counsel for both parties only after the trial and conviction of the Licensee on the criminal charges, the conviction language is the only aspect of item F that is involved here.

The Administrative Law Judge does not agree that these rule violations should be viewed as relatively minor. For example, compliance with the rule requiring immediate reporting of serious injuries is critical in order to keep the Local Agency and the Department informed of situations that may be indicative of poor supervision, unsafe conditions, abuse, or neglet - In addition, adherence to the rule limiting the numbers of infants, toddlers, and under-school-age children in care at any one time is of utmost importance in ensuring that there is adequate attention and supervision in the day care home. A failure to adhere to the requirements of the rule could result in catastrophic consequences if, for example, the provider were unable to evacuate all of the small children in the event of a fire or other emergency. Similarly, the Licensee's continued use of a mesh-sided playpen and her failure to use a gate or other barrier to guard against falls down the stairs could have resulted in serious injury to the children in her care. The Licensee inappropriately disregarded the Department's rules in these circumstances and substituted tier own judgment concerning what was ''safe." Although fortunately no children were injured as a result of the Licensee's failure to adhere to these rule provisions, her day care children were placed at risk and could have sustained serious injuries as a result of the violations.

Moreover, home visits conducted after the adverse licensing action was ini tiated reflect the Licensee' s continuing lack of compliance with the day care rules . During an unannounced visit in February of 1990, following the initiation of the adverse licensing action, the Local Agency determined that the Licensee was continuing to fail to utilize a stairway gate and that she was once again in non-compliance with the age distribution rules. The Local Agency also found in February 1990 that the Licensee had violated the family day care rules by failing to complete training classes required of licensees

during their first year of licensure, neglecting to install safety latches on the knife drawer and under the kitchen sink, failing to have an appropriate-sized fire extinguisher on hand, and failing to up-date her cats ' rabies innoculations. The Licensee had failed to correct the violations noted in the preceding sentence by the time of a subsequent home visit conducted on May 17, 1990, three months later.

While the infractions set forth in the paragraph above are not directly at issue in this revocation proceeding in that they do not form the basis for the recommended adverse action, they do suggest that the Licensee does not take the requirements of the rules seriously and/or does not appreciate the need for compliance, even during a time period when she might have expected to be under increased scrutiny from the Local Agency. It is particularly disturbing that the Licensee again neglected to comply with the stairway gate requirement ten months after she was first cited for that violation, and again violated the age distribution requirements of the rules sixteen months after she was first cited for an age distribution violation.

Due to the Licensee's conviction of a Chapter 152 crime and her violations of various other provisions of the family day care licensing rules, the Administrative Law Judge has recommended that the Commissioner's proposed revocation action be affirmed. In reviewing this matter, the Commissioner may wish to consider whether an exception to the mandatory revocation required by Minn. Rules 9502.0335, subp. 6(F), may be warranted where, as here, it is alleged that the controlled substance did not belong to the Licensee but was

merely present without her knowledge in a car she borrowed from an acquaintance. The re i s no ev i denc e of ti s e of cocaine by the L i c en see sinc e 1987, the date of her application for day care licensure. If the Commissioner decides that a probationary period would be an appropriate remedy, the Licensee has i ndicated that she woul d be willing to undergo periodi c drug testing and chemical dependency counselling as a condition of the probation in order to allay any concern about her possible use of drugs.

B.L.N.